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No. 79-1128

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF MONTANA, ET AL.,
Petitioners

v.

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE CROW TRIBE IN OPPOSITION

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The Respondent, Crow Tribe of Indians, Montana, adopts the United States' preliminary paragraphs.

TREATIES AND STATUTES INVOLVED

The Crow Tribe adds one additional statute: Organic Act of the Territory of Montana, Act of May 26, 1864, 13 Stat. 85, 86, Section 1.

> ". . . Provided, further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in

said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed."

STATEMENT

The Crow Tribe accepts the United States's Statement, with these additional comments.

The United States initiated this civil action in recognition of its trust duty to protect valuable treaty rights of the Crow Tribe to hunt and fish. In order to protect those rights the Crow Tribal Council enacted Resolution 74-05 on October 13, 1973 (Pet. App. 119-120). Previously the Crow Tribe had issued licenses in a limited fashion to non-members to fish, and take small game and birds (Pet. App. 119). The main reason for closing hunting and fishing to non-Indians was that the game and fish upon which a great number of Crow people depend for subsistence was facing a shortage (Pet. App. 119).[1]

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[1] The reasons for this closure are fully outlined by the Superintendent, Bureau of Indian Affairs, Crow Indian Agency, in his Memorandum to the Area Director, dated November 14, 1973. (Crow Tribe Exh. 71qq). The reasons include, in addition to the growing shortage of the fish and game, "the influx of

The Crow Tribe in modern times has resisted the forces of assimilation. To a great extent the Tribe's language, customs and culture are preserved. The Big Horn River, a navigable stream which flows from south to north, bisects the Reservation and has had a religious significance to the Crows.[2] Historically the Big Horn River was part of the Tribe's "commissary". Besides fish to supplement their diet, the bed of the river provided "sea shells" which was a medical cure.[3] The rounded rocks from the bed were central to providing heat for the sweat lodges for body purification.[4] The bed provided wood for fuel. The beaver were abundant on the beds and banks.[5]

The court below outlined attempts by the Tribe to control hunting and fishing on the Reservation during the transitional period of the early 1900's (Pet. App. 14, fn. 11A). Since those times the Tribal Council has ac-

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sportsmen, meat hunters and poachers;" the general public taking advantage of the Tribe's inability to control the situation; action by the State of Montana and the U.S. National Park Service indicating that they wished to develop the Reservation for hunting and fishing without regard to tribal wishes; the "press of public opinion to open the entire reservation to hunting and fishing;" the fact that the Tribe was spending much more than its licensing revenues to police the reservation, and such policing was woefully inadequate; the fact the State's policing was only "token to say the least and the state does not even give the appearance of recognizing that there is a problem." The Superintendent concluded that

> "This office is convinced that the Crows concerns are well founded and that under existing circumstances their action is timely and fully justified."

The Superintendent indicated that after full closure had been effected, the Tribe might consider reopening the reservation during certain seasons.

[2] Big Metal for the Crows, Henry Old Coyote, Crow Exh. 75.

[3] Testimony, Henry Old Coyote, Tr. 184.

[4] *Id.*

[5] Sits-in-the-Middle-of-the-Land, Crow Exh. 74, p. 495.

tively sought to control access to the fish and game on the reservation.[6] Basically the Crows have always strenuously resisted access to their big game animals, principally deer, elk and buffalo, while periodically allowing access to small game and fishing.[7]

It is against this backdrop that Resolution 74-05 seems consistent with prior tribal actions. Resolution 74-05 is a remedy in which the Tribe has sought to protect its interests. This civil action was brought by the United States to preserve those interests.

ARGUMENT

1. Neither the Treaty of 1851 nor the Treaty of 1868 Evidenced Any Intent to Remove the Beds and Banks of the Big Horn River from the Land Owned by the Crow Tribe.

At the outset, we point out that the holding by the court below does not seem to present a certworthy issue. The court established no new law, but merely followed the procedures established by this Court in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), which held that the ownership of the streambed of a navigable river within an Indian Reservation depends on the facts—what the treaties say, what the United States intended, and what the Indians understood.

Following the factual analysis dictated by that approach, the court below could not have ruled other than it did. When the white man first met the Crow Indians, the Crows owned all the land through which the Big Horn River flows, from its headwaters to where it empties into the Yellowstone. In the 1851 treaty, 11 Stat.

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[6] During the last thirty years the Crow Tribal Council enacted numerous tribal resolutions concerning fish and game, Crow Exh. 70a-71aaa.

[7] Testimony, Joe Medicine Crow, Tr. 157; Pet. App. 19.

749, the United States solemnly recognized in very simple terms that this territory belonged to the Crows.[8] The treaty was a *recognition* of their continuing ownership, not a grant of any land to them.[9] If it was a grant of anything, it was a grant of a right to be protected in their ownership in the courts of the United States, a right they may not have had previously.[10] Nothing appears that gives any suggestion that the United States intended not to recognize the Tribe's title to the riverbed, or that the Tribe understood that the riverbed was not included in the recognition.

Later, when the United States wanted to acquire some of the Crows' land, it did so by another treaty. 15 Stat. 649 (1868). This time the Yellowstone River formed part of the boundary between what the Tribe was ceding and what it was reserving, and the calls ran the cession line down the middle of the Yellowstone.[11] That is, the Tribe ceded only the far half of the Yellowstone bed, keeping the near half. Again, there is no suggestion that the Tribe was ceding any riverbeds except of course the far half of the Yellowstone bed.

We think it is also significant that when Montana became a Territory in 1864, the Territorial Act declared that any Indian treaty lands were to "constitute no part of the Territory of Montana, until said tribe shall signify their assent . . . to be included within said territory . . ."

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[8] Pet. App. 85; *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 272 (1935).

[9] See *United States* v. *Winans*, 198 U.S. 371, 381 (1905).

[10] See *Tee-Hit-Ton Indians* v. *United States*, 128 Ct. Cl. 82 (1954); but see *United States ex rel. Hualapai Indians* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941).

[11] Pursuant to the Treaty of 1868, the northern boundary of the Crow Reservation was "thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone . . . ." Article 2 (Pet. App. 89).

Full quotation above, p. 2. And when Montana became a state in 1889, it was required to disclaim all title "to all lands lying within [the state] owned or held by any Indian or Indian tribes . . . ." Pet. 5.

In the face of all this, for Montana to argue that when it became a state in 1889 it acquired the bed of the Big Horn River is ludicrous. If the State of Montana's argument is correct, then the Crows did not even own the near half of the Yellowstone riverbed. Yet during the course of these proceedings the State of Montana has never maintained that the mid-channel of the Yellowstone River was not the northern boundary of the Crow Reservation, or that the point from the "mid-channel of the Yellowstone" to its southern bank was never reserved by the Crow Tribe according to the Treaty of 1868 (Pet. App. 10-17).[12]

Although the Big Horn River was not expressly mentioned in the Treaty of 1868 (because it was wholly within the "metes and bounds" description of the reservation), *Choctaw Nation* instructs that the "natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and bed of rivers." 397 U.S. at 634.

This is an "undivided tract of land" set apart by an explicit exterior metes and bounds description, of which the beds and banks of the Big Horn River seem "clearly encompassed within the grant." *Choctaw Nation*, 397 U.S. at 628. Besides the plain reading of the inference

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[12] Recently, this Court in *Wilson* v. *Omaha Indian Tribe*, —— U.S. ——, 61 L.Ed.2d 153 (1979) reviewed the operative effect of language almost exactly similar to that of Article 2, 1868 Crow Treaty: the "center of the main channel of the Missouri River" according to the Treaty of March 16, 1854, 10 Stat. 1043, with the Omaha Tribe. "The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the thalweg. That land, as modified by a subsequent treaty and statutes, has remained the home of the Omaha Indian Tribe." 61 L.Ed.2d 153 at 161; see also discussion at 168-9.

from the treaty of 1868, the Court below in its *Finch* opinion [13] meticulously outlined the "negotiations and background" of both the Treaty of 1851 and the Treaty of 1868 (Pet. App. 69-75) and concluded:

> "Both the assurances given to the Indians during the negotiation of the treaty of 1868, considered against the background of the treaty of 1851, and the explicit language of the 1868 treaty could have had no other meaning in the minds of the Indians than that the Government recognized that all the lands within the metes and bounds of the reservation were to be theirs." Pet. App. 74.[14]

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[13] An earlier stage of the instant case is *United States* v. *Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated* 433 U.S. 676. Reprinted Pet. App. 56.

[14] This was clearly the understanding of the Crows. On August 11, 1873, only 5 years after the Treaty of 1868, the United States met with the Crows near present day Livingston, Montana, to discuss protecting the Tribe's lands from further cessions requested by the United States. Of critical importance to this negotiation is that Chief Sits-in-the-Middle-of-the-Land, also known as Blackfoot, was also the Crow Tribe's principal spokesman during the 1868 Treaty negotiations and pre-negotiations in 1867. Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867-1868 (1975) at pp. 88-91; and see p. 88: ". . . the Crows used to own all this Country including all the rivers of the West. . . ." He did most of the speaking in 1873. Selections of his words and those of the United States through its chief negotiator, Felix R. Brunot, are most appropriate (from Crow Exh. 74, emphasis added):

> (Brunot) ". . . [1868] treaty says where the Crow land is to be. I think it is a good country. It is along this river about seventy-five miles above the agency, and then goes toward where the sun rises until it *crosses the Big Horn*, and goes half way between it and the mouth of the Rosebud River, about twelve miles this side of Porcupine Creek. This is what the treaty and the maps say. That is the country that belongs to you forever, or until you wish to sell it." (p. 494)
>
> (Blackfoot) ". . . All the other Indian tribes fight the whites; we do not do so. We love the whites, and we want them to leave us a big country. . . . The Great Spirit made these mountains and rivers for us, and all this land. We were told so, and

This issue is not worthy of review. The question is factual, not legal; the legal question has been clearly settled in this Court's decision in *Choctaw Nation*. There is no obvious need here to clarify the law. The specific question itself has been raised and considered carefully not once but twice by the court below.

2. Federal Law Defines the Extent of Federal Patents of Lands Riparian to the Big Horn River Wholly Within the Crow Reservation.

On the State's Motion for Reconsideration below in light of *Wilson* v. *Omaha Tribe of Indians*, —— U.S. ——, 61 L.Ed.2d 153 (1979), the Court of Appeals considered whether the upper limit of the title to the bed and banks of the Big Horn River, which is held in trust by the United States for the Crow Tribe, carries to the "high" or "low" water mark (Pet. App. 24-26). Under

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when we go down the river hunting for food we come back here again. . . ." (p. 495)

(Blackfoot)

"When we set up our lodge-poles, one reaches to the Yellowstone; the other is on White River; another one goes to Wind River; the other lodges on the Bridger Mountains. This is our land, and so we told the commissioners at Fort Laramie. . . ." (p. 496)

On the fifth day, August 15, 1873:

(Blackfoot) "On this side of the river and on the other side is our country. I do not know anything about it, I will tell you about it, for I was raised to mark all our country, the streams and mountains, and I would like to keep it . . ." (p. 506).

Brunot, the negotiator, responding to what Blackfoot wanted to give up, stated:

". . . The reason why I do not think Blackfoot's proposition is good, is this: if the Crows keep the valley and sell the mountains, the whites will want all the time to go through your country; your horses will not be safe. If you want wood it is nearly all in the mountain. *You sell even the water-courses with them*; . . ." (p. 507)

Montana law, the limit would be the low water mark. Under ordinary federal law, the limit would be the high water mark.[15]

It was clear that federal law applied as a general proposition, but the precise question was whether federal law should borrow the state rule in this case. After reviewing this Court's reasoning in *Wilson*, the lower court concluded that the federal rule should apply: that the upper limit carried to the ordinary high water mark; that the state rule should not be borrowed, because use of the federal rule, referring to the words of *Wilson*, "very well may prevent frustration of 'federal policy and functions'," owing to the particular history of the allotments of riparian land on the Crow Reservation (Pet. App. 26).

Presently, a substantial amount of land bordering the Big Horn River is either owned by the Crow Tribe, or by individual tribal members who obtained allotments from tribal land. Those riparian lands today owned by the State or by non-Indian individuals were all originally allotted to Indians pursuant to the 1920 Crow Allotment Act, 41 Stat. 751 (Pet. App. 105).[16]

The 1920 Crow Allotment Act was an "affirmative expression" of sovereignty and self-government which was reaffirmed by Congress.[17] Under it, monies were appro-

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[15] *Confederated Salish & Kootenai Tribes* v. *Namen*, 534 F.2d 1376 (9th Cir. 1976), aff'g 380 F. Supp. 452; *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942). These cases both arose in Montana. See also *United States* v. *Romaine*, 255 Fed. 253 (9th Cir. 1919) (arose in Washington), and see opinion below, Pet. App. 25.

[16] In light of the comprehensive nature of the 1920 Crow Allotment Act (Pet. App. 105), the General Allotment Act of 1887 (Pet. App. 97) had little application to the Crows.

[17] The Crows generally viewed the 1920 Crow Allotment Act as "an expression of self-government." This expression and understanding was so strong that fourteen years later when Congress

priated "to pay the expenses of the general council, or councils, or business committee, in looking after the affairs of said tribe." Section 18 (Pet. App. 118).

The 1920 Crow Allotment Act was a division of Crow Tribal lands among the tribal members. Non-Indians could, however, acquire land in two fashions from allottees: either purchase of lands from allottees who had obtained fee patents under Section 1 (Pet. App. 106), or sales by the Secretary of Interior of inherited allotted lands, with the consent of the Indian allottee, to soldiers, seamen, or marines, Section 15 (Pet. App. 116). Restrictions were placed on the amount of land any one tribal member could sell. Article 13 (Pet. App. 115-116). The Tribe could not alienate land. In order to protect reservation interests, Section 2 (Pet. App. 106) placed a maximum limit on the acreage any one person or corporation could acquire.

This detailed discussion shows that although non-members could acquire land, that ownership emanated from the original allotment process. The 1920 Crow Allotment Act did one more extremely important thing which is central to the holding of the court below. Although land could go out of "trust" status, and into an alienable "fee" status, even if the land was sold to a non-Indian it could be returned to an Indian trust status under the 1920 Crow Allotment Act. Section 14 (Pet.

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enacted the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, the Crows felt the application of the IRA as unnecessary. Testimony of Joe Medicine Crow, Tr. 119. The IRA as amended also reaffirmed this belief. 25 U.S.C. 478b.

Article 6 of the Treaty of 1868 (Pet. App. 92) recognizes that a large quantum of sovereignty existed in the Tribe. For instance, it was recognized that "the United States may pass" legislation "on all subjects connected with the government of the Indians . . . and the internal police thereof, as may be thought proper." Clearly Congress must take *affirmative steps* in an *express fashion* to diminish the Tribe's sovereignty, and where it has not it would be reserved to the Indians' form of government.

App. 116). Titles to lands within the reservation are in a continuing state of flux, going into and out of Indian trust status.

In the *Wilson* case, this Court was concerned about the fact that private landowners who buy land "adjacent to or across from Indian reservations" expect state law to apply. But this cannot be true of a private landowner (or in this case the State, acting in the same manner as a private landowner) who buys land *inside* the Reservation. Such a landowner here would undoubtedly have expected the federal rule on Indian reservations to apply (note 15 supra), and would not have expected to oust the Tribe's ownership of the land between the low and high water lines.

It is obvious, therefore, that there is a continuing federal interest even in alienated lands on the reservation, and that a uniform federal rule should apply. Under the federal rule, the upland riparian land carries to the ordinary high water mark.

Furthermore, the court below held that "when the assumption regarding the title to the Big Horn is removed [i.e., the assumption that the State owns the bed], however, there is much less reason to expect that state law will fix those limits." Pet. App. 26. The State, therefore, in order to establish that its law applies, must assume that the State owned the bed and banks of the Big Horn River in the first instance, which was "to assume something not then established by law" (Pet. App. 26), and which is now disclosed not to be the law.

Thus, tribal ownership of the lands below the ordinary high water mark was not to be at the "mercy of the future state." *Rochester, supra*, 127 F.2d at 192. There is no conflict with this Court's decision in *Wilson*, and no occasion for this Court to speak again on the matter.

3. There Is No Conflict With *Oliphant* Nor With Section 1165 of Title 18 of the U.S. Code.

The State argues (Pet. 19) that the lower court's decision extending Indian control over non-Indian fee land is in conflict with the *Oliphant* case, 435 U.S. 191, and with 18 U.S.C. § 1165.

The *Oliphant* case merely held that tribes do not have *criminal* jurisdiction over non-Indians.[18] The court below recognized this, and limited the Tribe's enforcement powers to noncriminal remedies, primarily the right to expel those who enter the reservation without proper authority or who violate tribal, state or federal laws; or to refer violators to state or federal officials (Pet. App. 18).[19] There is certainly no conflict with *Oliphant* here.

The State also says (Pet. 20) the lower court "ignored the treaty language which implicitly divested the Tribe of jurisdiction over non-Indians . . . ." The court did no such thing. The treaty language to which the State presumably refers (it does not cite any language on p. 20, but it apparently refers to Art. 1 of the 1868 Treaty, Pet. App. 88) provides that if "bad men among the whites" commit any wrong, the U.S. will punish the offender. This clause merely declares that the U.S. will assert criminal jurisdiction over white wrongdoers on the reservation. It does not affect the Tribe's *civil* jurisdic-

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[18] This Court in *Oliphant* referred only to a tribe's *criminal* power over non-Indians. Virtually every single reference in *Oliphant* to the Tribe's power at issue (out of about 60 such references) is to "*criminal* jurisdiction over non-Indians," or "power to *try and punish non-Indians*" (emphasis added). Such care to limit its holding to *criminal* power shows that the Court did not intend to alter the cases upholding tribal civil jurisdiction over non-Indians, see note 20 below.

[19] Citing *Quechan Tribe* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976), quoted at Pet. App. 18. If the violation of tribal regulations takes place on Indian land, the violator may be in violation of 18 U.S.C. § 1165. This makes a federal offense of going on Indian land without permission for the purpose of hunting or fishing.

tion over whites, and tribes clearly do have *civil* jurisdiction over non-Indians.[20]

Petitioner (Pet. 20-22) argues vigorously that 18 U.S.C. § 1165 does not apply to non-Indian land within the reservation, as if the court below had ruled that it did. The court below was well aware that § 1165 only applies to Indian land.[21]

4. Resolution 74-05, as Modified by the Court of Appeals, Is a Valid Exercise of Tribal Authority.

The State has maintained that it can affirmatively authorize, through its licensing processes, non-members to take part in the Tribe's right to hunt and fish.[22] The United States and Crow Tribe sought to enjoin this significant "state action" which substantially interferes with tribal rights. This Court has long recognized that:

> ". . . absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

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[20] *United States* v. *Mazurie*, 419 U.S. 544 (1975) (power to regulate non-Indian liquor activity); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904) (power to tax non-Indians); *Merrion* v. *Jicarilla Apache Tribe*, —— F.2d —— (10th Cir., 2/22/80, en banc 5-2) (power to tax non-Indians; full review of cases given).

[21] See opinion, Pet. App. 7, where the Court rejected the District Court's holding, including No. 4, that the Tribe's rights "are limited to those lands set forth in 18 U.S.C. § 1165," i.e., to Indian land. This limit was also covered in the parties' briefs, see Brief of Appellant Crow Tribe, Oct. 16, 1978, at p. 46 n.32. And see Pet. App. 12, where the court correctly refers to the fact that § 1165 "makes going on Indian land to hunt or fish without permission a criminal offense."

[22] See opinion below, Pet. App. 6; see Pretrial Order June 20, 1978, II Agreed Facts, C.T. 966; and see note 1 above. Another aspect of the case which the Tribe found objectionable was that the State had acquired land on the reservation riparian to the Big Horn River, and was inviting the public to enter the reservation and fish from that land.

In *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164 (1973), the Court clarified the proper application of the *Williams* infringement test:

> "The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." 411 U.S. at 179.

The Court of Appeals below correctly held that ". . . the State of Montana cannot require the Crows to admit non-members into the reservation for the purpose of hunting and fishing . . ." Pet. App. 20.

Resolution 74-05 was a remedy which the Crow Tribal Council fashioned to protect the subsistence nature of the Tribe's Treaty right to hunt and fish founded upon the Treaty of 1851, Article 5 (Pet. App. 86), and Treaty of 1868, Article 5 (Pet. App. 90).

The State (Pet. 23-26) argues that the Tribe's regulation of a non-Indian fee owner's hunting and fishing shocks the conscience and takes property without just compensation.

The Tribe adopted Resolution 74-05, banning all hunting and fishing by non-Indians until further notice. The full reasons are listed at note 1 above. One of the reasons was the incredible arrogance of the State in licensing non-Indians who did not even live on the Reservation, to come on the Reservation and hunt and fish, as though the Tribe had no say-so whatever. The Tribe's reaction is understandable. It is also legally correct, (1) because the Tribe's hunting and fishing rights are exclusive, and the Tribe has sole power to license them; (2) because the Tribe has the treaty power to bar anyone without authority from entering the Reservation; and (3) because the Tribe has the power to regulate activities on the Reservation, including non-Indian activity.

The court did not discuss the first power. Thus, while we believe it is a fully supported independent basis for Resolution 74-05,[23] we do not discuss it here, beyond noting that it would seem obvious that the Tribe, as owner of the bed of the Big Horn River, could exclude anyone from fishing on the river.[24]

The second power was referred to by the court below at Pet. App. 10. The court held that the Tribe's power to exclude was modified by the General and Crow Allotments Acts, which indirectly permitted non-Indians to acquire land on the reservation. The court believed that Congress must have intended that those who acquired land on the reservation and lived there could not be excluded from the reservation, nor could the power of exclusion be used to bar them from hunting and fishing on their own land. Pet. App. 13, 15. While the tribe believes that its power to exclude does empower it to

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[23] The treaty right to hunt and fish is a Crow "exclusive" property right, and exists independently of ownership of the land. See *United States* v. *Winans*, 198 U.S. 371 (1905); *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Antoine* v. *Washington*, 420 U.S. 194 (1975); *Washington* v. *Fishing Vessel Ass'n*, —— U.S. —— (1979); *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974); *cert. den.*, 419 U.S. 1019; *United States* v. *Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); and *State* v. *Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. den.*, Feb. 26, 1980.

It is interesting to note that Montana itself has held that Indian hunting and fishing rights are exclusive, and did not pass to non-Indian land purchasers:

> "The exclusive right to hunt and fish [within the Flathead Reservation] . . . is a servitude and easement and an interest in the land . . . No patent issued by the government, either federal or state conveyed this right and interest." *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629, 635 (1954).

[24] In the earlier case (*Finch*, note 13 above), the Ninth Circuit so held. Other cases holding that a non-Indian lawfully on an Indian reservation may not fish there without tribal permission are *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918); *United States* v. *Pollman*, 364 F. Supp. 995 (D. Mont. 1973).

ban hunting and fishing on the reservation, even by resident landowners, it did not cross-petition.

The court held that the Tribe possessed the third power (the power to regulate activities on the reservation) and that it extended to hunting and fishing by non-Indians. Pet. App. 17. However, it held that this power could only be enforced by non-criminal means. Pet. App. 19. It also held that the State had concurrent jurisdiction to regulate non-Indians on the reservation. Pet. App. 20. The net effect was that resident non-Indian landowners have to observe whichever authority is stricter on any given point. Pet. App. 21.

The discussion of the third power might be thought to be dicta, since the Tribe totally banned hunting and fishing by non-Indians, and made no effort to "regulate" it.[25] However, as to resident non-Indian landowners on the reservation who live on their land, the court said the Tribe did not have the power to totally ban hunting and fishing, but did have the power of reasonable regulation.

In none of this is there anything that shocks the conscience or violates the Fifth Amendment. People who take up residence on an Indian reservation should expect to be subject to reasonable tribal regulations. They have been subject to such regulation for many years, see note 20 above. Hunting and fishing activities in which Indian tribes have a particular traditional interest, frequently recognized in treaties and statutes,[26] are a fortiori within the Tribe's power to regulate.

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[25] Previous to Res. 74-05, the Tribe did regulate its hunting and fishing resource by allowing access through a licensing process. Pet. App. 119, see p. 2 above.

[26] As discussed above, both the 1851 and 1868 Crow treaties refer to hunting and fishing rights. 18 U.S.C. § 1165, discussed above, was designed to protect tribal hunting and fishing rights, and see also 18 U.S.C. § 1162(b).

The court below correctly recognized that:

> "The Crow Tribe with respect to its reservation is, of course, more than merely a private owner. The Tribe possesses 'attributes of sovereignty over both their members and their territory . . . .' *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). These 'attributes spring from *"inherent powers of limited sovereignty which [have] never been extinguished."*' 435 U.S. at 322 (quoting F. Cohen, Handbook of Federal Indian Law, 122 (1942) (emphasis in original)." Pet. App. 17.

In holding that the Crow Tribe has the power to regulate hunting and fishing by non-members within the exterior boundaries of the reservation, the Court of Appeals made a careful and commendable effort to fulfill its recognized task in this type of case to "fix the rights and powers of Indians in the latter part of the twentieth century in light of treaties of an earlier century" (Pet. App. 15).

The petition for certiorari should be denied.

Respectfully submitted,

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